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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-927

BANKERS LIFE & CASUALTY COMPANY,
Petitioner,

vs.

THE VILLAGE OF NORTH PALM BEACH FLORIDA, ETC., ET AL.,
Respondents.

PETITION OF BANKERS LIFE & CASUALTY COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

PETITION OF BANKERS LIFE & CASUALTY COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on August 14, 1972. Petition for Rehearing was filed. On that Petition the Opinion was somewhat modified and the Petition for Rehearing otherwise denied on September 25, 1972.

(a) Opinions.

The District Court for the Southern District of Florida, Miami Division, tried the case without a jury and entered its findings in favor of the Petitioner, which are not re-

ported, and are printed in Appendix 1 to 7. The Court of Appeals' Opinion reversed, and remanded the case in part, and is not yet reported. It is printed in Appendix 8 to 24. The Opinion on Rehearing is at pages 25 and 26.

(b) Jurisdiction.

Final judgment denying rehearing was entered September 25, 1972. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

(c) Questions Presented.

1. Where the Army Corps of Engineers in the exercise of the federal authority over navigable waters has considered navigation factors (as required by the River and Harbors Act), and also ecological factors (as required by the Fish and Wildlife Coordination Act) and decided to grant an extension of a dredge and fill permit to allow completion of a project, may that federal grant be conditioned upon a similar dredge and fill permit being secured from local village authorities?

2. Where federal navigable waters are involved, is it proper for the Court of Appeals to remand a case for further hearings without keeping in the case the only federal authorities with jurisdiction over federal navigable waters?

3. Where the Corps of Engineers delays extending a fill permit upon written assurances that the lapse "will have no effect insofar as the Corps of Engineers is concerned" and there was detrimental reliance upon this assurance, may the lapse of time be used by the Court of Appeals as justification for reversing the trial court's finding the landowner was entitled to the extension?

4. As long as remandment of part of the case was ordered should not the Court of Appeals have also remanded the

rest of the case to the District Court for full hearing on the degree to which the Corps of Engineers had made, or should now make, such investigation and determinations of navigation and ecological factors as are required to be made under applicable federal laws as a condition to issuing or refusing to issue an extension of the dredge and fill permit?

(d) Statutes Involved.

RIVERS AND HARBORS ACT, 33 U. S. C. SECTION 403,

§ 403. *Obstruction of navigable waters generally; wharves; piers, etc.: excavations and filling in*

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. (Mar. 3, 1899, c. 425, § 10, 30 Stat. 1151.)

STATEMENT OF THE CASE.

Bankers Life & Casualty Company owns in Palm Beach County, Florida a long 288 acre tract fronting for over a mile and one-half (8000 ft.) on the Atlantic Ocean. On the West it faces a navigable waterway which is federally maintained, known as the Intercoastal Waterway. Bankers is the riparian owner both on the ocean and the waterway.

The 1957 Permit.

Bankers was given a permit in 1957 by the Corps of Engineers to fill its property out to the West to the federally established bulkhead line of the Intercoastal Waterway. Palm Beach County, Florida consented to the issuance of the permit. The State of Florida Board of Trustees of the Internal Improvement Trust Fund sold to Bankers 2½ million cubic yards of fill.

It was stipulated below that Banker's evidence that the land when filled would have a fair market value of $21,250,000 would not be contested by any of the defendants.

Bankers started filling in 1957. The following year, 1958, Congress passed the Fish and Wildlife Coordination Act, 16 U. S. C. A. § 662(a). For the first time Congress required ecological considerations to be weighed by the Corps of Engineers before allowing dredging and filling of land abutting navigable waters.[1]

1. The requirements of that 1958 Act are basically unchanged to this day. The Court of Appeals cites the National Environmental Policy Act of 1969 42 U. S. C. A. §§ 4331-4347. That Act is later, but so far as the Corps of Engineers' waterway permits are concerned the still controlling ecology requirements came into effect with the Fish and Wildlife Act of 1958, eleven years earlier.

The 1960 Extension.

In December, 1960 the Corps of Engineers was asked by Bankers for an extension of the fill permit to December 31, 1963.

The only government witness was Mr. McKnight, who was in charge of permit matters for the Corps of Engineers' Jacksonville office. His testimony is summarized and printed in Appendix pages 27 to 29. He testified that when the extension was requested in 1960 State and Federal agencies were requested to give their comments on the ecological effect of the fill *as required by the newly in force 1958 Fish and Wildlife Coordination Act* (App. 27). Mr. McKnight testified this was done because of the new requirements that ecological factors be considered before the extension could be granted. He stated the effect of the steps taken to obey the new statute as follows:

> "We must have determined that there were no overriding damages to the fish and wildlife resources, or we would not have extended it in 1960." (App. 29.)

An extension was granted for another three years, and there was further filling.

The 1963 Extension.

Prior to the expiration of the permit on December 31, 1963 Bankers applied to the Corps for a further extension. The Florida Trustees were advised of Bankers' request, and the Florida Trustees wrote the Engineers asking that issuance of the renewal be delayed until Bankers had secured a "local fill permit" from the Village of North Palm Beach.[2]

---

2. Florida had passed a statute which purported to authorize any local municipality to issue, or refuse, permits even on *navigable* waters, and to require *purchase* of the land to be filled from the Florida Trustees. See footnote 4, *infra*.

The Corps of Engineers then advised Bankers, by a letter (set out in full at footnote 1 to the Court of Appeals Opinion, at App. 10) that it was "our plan to issue the requested time extension immediately" but there was to be a delay solely while Bankers secured a "local fill permit." The Engineers took notice the Federal permit was about to lapse, but specifically said:

> "The lapse in the permit will have no effect insofar as the Corps of Engineers is concerned."

The Negotiations.

Bankers tried to get the local permit through long negotiations with the Village. At one point the controversy was resolved, and the Village adopted an ordinance to give Bankers a local fill permit, but then the Village attempted to revoke the ordinance.[3]

The Litigation.

Bankers finally went to Federal Court making the Corps of Engineers and the State and Local authorities defendants, and asked the Federal Court to decide whether Bankers had to suffer further delay waiting for extension of the fill permit. The District Court decided in favor of Bankers the State questions as to the right to fill the submerged land without a local fill permit (App. 4). The court held the Engineers were not justified in waiting for a local fill permit to be issued to Bankers, and should now proceed

3. The Fifth Circuit acknowledges that Bankers and the Florida authorities, State and Local, are in a dispute over "a serious question of title to submerged lands under somewhat unique and unlitigated Florida Statutes . . ." (App. 17). The Fifth Circuit has sent this phase to the controversy back to the District Court for either its determination or for "certification of the Supreme Court of Florida as authorized under the Florida Statutes". (App. 24)

with the issuance of the renewal the Engineers had in writing said they were ready to issue (App. 4). The court found jurisdiction was properly based upon 28 U. S. C. A. § 1332, 1361 and the Fifth Amendment (App. 2).

The Fifth Circuit sent the case back to the District Court, but only the Florida defendants were left in the case. The Corps of Engineers defendants, the only ones who could issue the renewal permit, were dismissed by the Fifth Circuit.

The Court of Appeals' opinion treats this case as presenting important "ecological and environmental" questions. Congress has given a mandate to the Corps of Engineers to administratively weigh such "ecological and environmental" factors. The only evidence in the record is that ecological considerations were considered and passed upon by the Corps of Engineers at the time of the extension of the permit in 1960, and that the Corps of Engineers were aware of, and gave full obedience to the 1958 statute which created the ecological standards binding up them *then* and *now*. The Court of Appeals has dismissed out of the case the federal agency to which Congress assigned weighing all such environmental factors, and has sent the case back for full development of facts and law only on Florida State questions. The Court of Appeals was aware that the resolving of these State questions was the only "go ahead" the Corps of Engineers was waiting for . (App. 12.)[4]

4. As the Court of Appeals was to note: "it was the purpose of the Corps of Engineers to proceed with an issuance of the extension" once a Village permit was received, that being the only condition "referred to in the State's letter". (App. 11.)

ARGUMENT.

I.

ECOLOGICAL FACTORS WERE WEIGHED BY THE ENGINEERS BEFORE GRANTING BANKERS' REQUEST FOR AN EXTENSION OF THE PERMIT IN 1960, SO THAT ISSUE WAS PASSED UPON BY THE APPROPRIATE FEDERAL AUTHORITY.

Petitioner agrees with the Court of Appeals that the climate changed as to the importance of environmental factors *after* the date of the *original issuance* of the permit in *1957*. Petitioner agrees that the Corps of Engineers had to change its decision making process to accommodate new environmental concern. However, the Court of Appeals never went beyond what ecological factors were considered by the Engineers at the time of the issuance of the *initial* permit in 1957, the Court noting:

> "There was nothing in the Federal Statutes at the time [1957] that required the Corps of Engineers to consider conservation, and there is nothing in the record to indicate that any study of possible ecological effects was made at that time." (App. 9.)

The Court's opinion originally took no notice of the important fact that by the time of the first extension request in 1960, the Engineers *were required* to consider ecological factors by the Fish and Wildlife Coordination Act, passed in 1958. On re-hearing the Court added a footnote acknowledging:

> "Prior to the granting of this extension, the 1958 Fish and Wildlife Coordination Act, 16 U. S. C. A. §§ 662(a) had become effective." (App. 26.)

The Court of Appeals does not credit the Government's own evidence that the Engineers obeyed that Statute and

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considered ecological effects before extending Bankers' permit in 1960.[5]

The testimony of Mr. McKnight (a witness put on by the Corps of Engineers) can fairly be read that State and Federal agencies were requested to give their ecological comments *as required by the 1958 Fish and Wildlife Coordination Act* before the renewal of the permit was given in 1960. We quote Mr. McKnight to show that the Jacksonville office of the Corps of Engineers knew of the new Federal statutory mandates that the effect of the dredge and fill on environment had to be considered before Bankers could be given the 1960 renewal:

> Answer by Mr. McKnight: "The Fish and Wildlife Coordination Act which gave us this authority [to consider ecological consequences] was passed in 1958, sir, and we did not have that on the books in 1957.
>
> Q. But I take it, in 1960 when you renewed this permit?
>
> A. Right.
>
> Q. You, in your official capacity, which you have held lo this many years, determined that they were not adverse ecological consequences of this permit?
>
> A. Well, I can say this, that we must have determined that there were no overriding damages to the fish and wildlife resources, or we wouldn't have extended it in 1960." (App. 29.)
>
> Answer by Mr. McKnight: ". . . We sent notices, the public notices which were issued, to the state and federal agencies for their comments." (App. 27.)

The Fish and Wildlife Coordination Act of 1958 is the identical ecology Act which *Zabel* identifies as the Act that Mr. McKnight's Jacksonville office did apply to recommend denial of the *Zabel* dredge and fill permit in Florida

5. The Corps' actions were completely consistent with the Fifth Circuit's opinion both here and in *Zabel* v. *Tabb*, 5 Cir. 1970, 430 F. 2d 199, that the Corps *should* consider changes in the Federal Laws as they are from time to time made.

waters and which the Secretary of the Army relied upon to refuse the permit. (See p. 202, and footnote 18 at p. 209, of 430 F. 2d.)

By the time Bankers requested another extension of the permit and the Engineers replied on December 27, 1963, "we will be pleased to grant the extension", the Jacksonville district office of the Engineers had accumulated five years experience in monitoring and enforcing federal ecological concerns with dredge and fill in Florida riparian lands. It must be assumed the Corps of Engineers did their duty, had exercised their investigative and discretionary powers, and had made the administrative determinations required by the then enacted Federal Statutes that there was no ecological damage sufficient to deny extension of the permit. *Pacific States Box and Basket Company* v. *S. T. White, et al.*, 296 U. S. 176, 186 (1935); *U. S.* v. *Sandbank*, 2d Cir. 1968, 403 F. 2d 38, 40 Fn.) The Court of Appeals simply assumed that such administrative evaluation had *not* been undertaken, as the fundamental premise for holding the case was not ripe for court action. (App. 16.) Fully applicable is this Court's admonition in *United States* v. *Rock Royal Cooperative, Inc., et. al.*, 307 U. S. 533, 567, 568 (1939):

> "Such an administrative determination carries a presumption of the existence of a state of facts justifying the action far too strong to be overturned by such suggestions as are made here."

It may be the (one day) trial below failed to fully develop the degree to which the Engineers' Jacksonville office did consider ecological effects of Bankers fill in 1960 and 1963. But the Corps of Engineers have been dismissed as parties on the hearings to take place after the remand.

As long as there is a remandment for further development of *some* facts the remand should include the Engineers *and* the crucial question of whether the Engineers had

administratively considered ecological factors and decided there was no ecological harm, as their witness testified.

We interpret *Zabel* v. *Tabb*, 5 Cir., 1970, 430 F. 2d 199 as making two key points, which we would summarize as:

1. It is necessary to get *permission* from the Engineers and the Secretary of the Army (as Bankers did) and

2. The Engineers and the Secretary of the Army should consider the current statutes, the definitive one *still* being the Fish and Wildlife Coordination Act, 16 U. S. C. A.—§ 662(a), (as the Engineers did).

If we are correct, the Fifth Circuit is not following it's own precedent, and has created a conflict in an important area of the law of our environment.

II.

THE ENGINEERS COULD NOT ALLOW THE LOCAL AUTHORITIES (STATE AND VILLAGE) TO USURP THE FEDERAL DISCRETION AS TO WHETHER BANKERS SHOULD OR SHOULD NOT GET A PERMIT.

The combined effect of the Rivers and Harbors Act, the 1958 Fish and Wildlife Coordination Act, and the National Environmental Policy Act of 1969 was to pre-empt to the Federal Government the sole power to make an administrative determination of the ecological impact of any proposed or continuing fill adjacent to navigable waters. The text of the federal statutes appears to impose only a duty to *solicit* the state's view on ecology. *Zabel* can be viewed as illustrating a striking clash between state and federal assertions of control over filling, and *Zabel* specifically upheld federal pre-emption over filling in land which is riparian to navigable waters.

At bar we see the opposite: a Village was allowed to usurp that federal authority.

The Court of Appeals described the situation in December, 1963 as being that the Corps of Engineers were willing to "proceed with an issuance of the extension" but that they deferred its issuance until "the matters referred to in the State's letter were cleared. . . ." (App. 11.)

As to what was "referred to in the State's letter", the Engineer's letter of December 27, 1963 is specific that the Corps of Engineers only awaited the "granting of local fill permit in accordance with Section 253.124, Florida Statutes of 1957." (App. 10, fn. 1.)[6]

The deferral request of the Trustees is erroneously described below:

> "That request clearly was at least partially based upon ecological and environmental causes, which the Trustees considered they had the right to have dealt with before withdrawing their objection." (App. 16.)

Nothing in the record supports such a conclusion that the State's request was partially based on "ecological and environmental causes". The basis of the deferral request by the Trustees was contemporaneously and accurately stated by both the Trustees and the Engineers: defer until the "granting of local fill permit in accordance with Section 253.124, Florida Statutes of 1957." (App. 10.) (See footnote 2 *supra*.)

The applicability of this Florida statute to Bankers the Court of Appeals thought depended upon "somewhat unique and unlitigated Florida Statutes . . .". (App. 17.) For discussion purposes related to the Government's Appeal, the opinion was willing to assume that 1957 statute *did not apply* to Bankers. (App. 17.)

A reading of that Section 253.124 Florida Statutes of

6. Equally specific was the Trustees' request for deferment. It solely mentions the "local fill permit in accordance with Section 253.124, Florida Statutes 1957."

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1957, (App. 30-31), shows it imposes no *ecological* tests, but solely deals with whether the fill would harm navigation, cause erosion, etc. The Florida 1957 Act was not inspired by ecological considerations. It was an Act which (in sections other than 253.124) sought to assert in the state sole title to wet lands, and force payment for the value of these lands by the upland owners to the Trustees, if the upland owners wanted to fill the wet lands.

We suggest that the Corps of Engineers could not statutorily or constitutionally condition Bankers' rights upon permission of others such as the Trustees or the Village. It is a well settled constitutional principle that the conditioning of rights otherwise granted by statute, to securing consent of others, is improper. The leading federal cases on the question are *Eubank* v. *City of Richmond*, 226 U. S. 137, 144 (1912) and *State of Washington ex rel. Seattle Title & Trust Company* v. *Roberge*, 278 U. S. 116, 122 (1928). Those cases center around consents required from others as a condition to letting a person improve his property (as Bankers seeks to do here) and the net of all of them has been summarized in *Valkanet* v. *City of Chicago* (1957), 13 Ill. 2d 258, 272 and *Drovers Trust and Savings Bank* v. *Chicago* (1960), 18 Ill. 2d 476, 479 as making federally unconstitutional giving the discretion to others whether the permit should be issued.[7]

The record does not show here a case where local interests were asked or volunteered to bring in ecological or other evidence for the Corps of Engineers to weigh and consider; we have here an outright delegation of the Corps' discretion to the Trustees or the Village. That is a constitutionally impermissible abridgement of Bankers'

7. It is true that Bankers tried to get such consent from the local authorities, but that does not block Bankers from asserting that only the Federal, and not the local, authorities had power to permit the fill. *Newark* v. *Central R. Co.*, 267 U. S. 377, 385 (1924).

right. The Fifth Circuit noted the District Court held the Village had no right to hold up the Federal permit (App. 13). This holding the Fifth Circuit was willing to accept for ruling on the federal questions: the local authorities should not have been given a veto over a federal agency (App. 13-14). But the Fifth Circuit balked at allowing Bankers any relief for the Village's unauthorized veto of completion of this $21,250,000 project.

III.

THIS CASE PRESENTS PROBLEMS OF WAIVER AND ESTOPPEL.

The Court of Appeals remanded for further hearings to determine when the fill started, and what was done. That Court also noted the possibility of a referral to the Florida Supreme Court for elucidation of the Florida Statutes, (a step we intend to request of the trial court). (App. 24.)

Development of the facts as to the timing and amount of the fill would also bear upon whether there was any waiver of the time limits in the permit by the Corps of Engineers, or any equitable estoppel that can be asserted against the Corps of Engineers.[8]

The Court of Appeals' opinion notes there are time limitations in the permit itself, but time limitations can be waived by words or conduct. Whether a waiver has occurred is "troublesome" and "each case must be decided on facts peculiar to it" but it does arise where there is conduct (or a letter, as here) assuring that the lapse of time would not be relied upon to Bankers' harm. *U. S.* v. *Chichester*, 312 F. 2d 275, 281-2 (CA 9, 1963). It is re-

8. In *Walsonavich* v. *U. S.*, 335 F. 2d 96 (C. A. 3d, 1964) it is said the doctrine of equitable estoppel "is to be rarely invoked against the United States" but "there are circumstances where the Government should be required by our law to stand behind the written agreements of a high public official like the Commissioner . . ." (p. 101.)

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spectfully suggested the decision on whether Bankers should be permitted to rely upon the Engineers' assurance "the lapse in the permit will have no effect" cannot be made until after all facts are developed on remand.

The facts already in the record show an estoppel is justified here. After the Corp of Engineers said it would be "pleased to grant the extension promptly upon the withdrawal of the deferral request . . ." and that the delay "will have no effect" (App. 10, fn. 1), what happened is described thusly by the Court of Appeals:

> "For several years no further action was taken as between Bankers and the Corps of Engineers. During this time various attempted settlements of disputes were negotiated between Bankers, the State of Florida and the Village of North Palm Beach, concerning the title of the submerged land sought to be filled." (App 10-11.)

The Village did give the permit in 1969, but immediately sought to revoke it, so this suit was filed. Any delay was occasioned solely by Bankers trying to resolve the questions which the Corps of Engineers had said Bankers should try to resolve, and such a delay was not supposed to hurt Bankers.

We believe the Court of Appeals evaluated this delay under a basic misunderstanding: The Court of Appeals was of the opinion that during this period of delay there was an increased interest in ecology which produced new congressional acts imposing *more stringent ecological requirements* upon the Corps of Engineers. We have already pointed out in Section 1 of this Argument that the ecological considerations as to *water* were imposed by the 1958 Fish and Wildlife Coordination Act. (See *Supra* pp. 8-9.) The Court of Appeals, though amending the opinion on rehearing to add a footnote acknowledging that in 1958 the Fish and Wildlife Coordination Act became the law

(App. 26), did not amend the many *other* places in its opinion which show that the Court of Appeals erroneously believed that there was a *change* in the law with respect to ecological factors dealing with wet lands *after* January 1, 1964. Thus, at one point the Court of Appeals said the District Court entered its order "without any consideration of the effect on . . . the ecology . . . that, during the period of inactivity by Bankers, had come much to the fore. . . ." (App. 13.) The Court of Appeals also spoke "of all the ebbing and flowing of the tides of change with respect to the duty of the Secretary of the Army in dealing with requests for such permits by the time Bankers got around to making an affirmative demand upon the Corps of Engineers for a renewal of the permit." (App. 14.) Again, the Court said:

> "Bankers is not in a position to complain, if, during the period of its own lack of effort to force the matter to an issue, the requirements on the Corps of Engineers for the issuance of a permit, although still couched in terms of 'navigation', included by the time the law suit was filed, much more stringent requirements." (App. 14.)

All such assumptions that there were new and more stringent ecological requirements bearing on riparian fill is completely in error, for the only important ecological act dealing with riparian or wet lands was, and is, the 1958 Fish and Wildlife Coordination Act.

All that actually occurred is the Corps of Engineers told Bankers to negotiate for a local permit with the local authorities. The District Court correctly held that such a local permit could not be legally required. (App. 4.) The Court of Appeals in effect agreed:

> "For the purpose of discussion of the government's appeal, we will assume that the Trustees incorrectly

> construed the 1957 statute as requiring Bankers to obtain a permit from the Village of North Palm Beach. . . ." (App. 13.)

Thus, both the District Court and the Court of Appeals were willing to hold the Engineers should not have refused to issue the extension unless a local permit was issued. This unauthorized delay, the Corps of Engineers represented, would not hurt Bankers. However, the government now says the delay is fatal, and Bankers can not rely on the representations made to it.

The following language from *Brandt* v. *Hickel*, 427 F. 2d 53, 57 (C. A. 9, 1970), is appropriate:

> "To say to these appellants 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government."

A very lengthy and learned discussion of estoppel with respect to the government is contained in *Gestuvo* v. *District Director of United States Immigration, etc.*, 337 Fed. Supp. 1093 (D. C. C. D. Cal., 1971). That case includes a discussion of this Court's opinion in *Moser* v. *United States*, 341 U. S. 41, 47 (1951) at pages 1100 to 1101.

If the law had *changed* during the period of delay after January 1, 1964, as the Court of Appeals erroneously believes, that would present an entirely different question. There were no changes from the government's point of view in the interval, and the government should be held to the word which it then gave, which was:

> "We will be pleased to grant the extension promptly . . ."

As the Court of Appeals opinion shows, the continuity of the original permit, and the relation back to the year 1957, is very important to protect Bankers' rights under

the Florida statute of 1957, which contains grandfather clauses in favor of Bankers, which *then* held a federal permit (App. 12, fn. 2).

Bankers has steadily followed a path, starting with the taking out of a permit in 1957, which the Corps of Engineers (who have Federal jurisdiction over everything wet and navigable) have said was the correct path. Appropriate here is the remark made in *Gestuvo, supra,* at page 1103 of 337 Fed. Supp.:

> "It was the Service that lead Gestuvo down the path towards permanent residence. Having done so, it should not have shoved him in a ditch along the way. Its action was improper."

CONCLUSION.

The Engineers knew in 1960 about the ecological problems in this precise North Lake Worth Area from others *prior* dredging and fill (we are assured by footnote 2, page 4, of the Government's Brief below) when they gave Bankers the extension in 1960. They had considered the ecology when in 1963 they advised Bankers they were "pleased to grant the extension" after a delay to seek a Village permit, a delay which would not harm Bankers. So with full knowledge of the effect of Bankers' proposed further fill on this already extensively filled area, an intentional extension of the permit in 1960, and waiver of the time limit in 1963, were given by the Engineers. Bankers asks that the extension be issued, or if doubt remain on whether the Engineers did exerice their administrative discretion on ecology the remand include the Corps of Engineers, and that question.

As the case now stands, Bankers permit extension is refused by the Court of Appeals for supposed ecological harm that the only evidence shows the Engineers held did not exist.

Respectfully submitted,

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APPENDIX.

UNITED STATES DISTRICT COURT
Southern District of Florida.

BANKERS LIFE & CASUALTY COMPANY, an Illinois corporation, authorized to transact business in the State of Florida,
Plaintiff,
vs.
THE VILLAGE OF NORTH PALM BEACH FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, et al.,
Defendants.
} No. 69-1053-Civ-EC

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on before the court on March 17, 1971. The parties waived trial by jury and presented a stipulation for an agreed case. Upon the evidence presented at trial, and having considered the stipulation and the oral and written advises of counsel, the court makes the following findings of fact and conclusions of law:

1. This is an action by the plaintiff, Bankers Life and Casualty Company, hereinafter called Bankers. Bankers is an Illinois corporation. The defendants are the Village of North Palm Beach (Village), a Florida municipal corporation in Palm Beach County, Florida; Board of Trustees of the International Improvement Trust Fund of the State of Florida, comprised of the Honorable Reuben Askew,

Honorable Richard Stone, Honorable Robert Shevin, Honorable Thomas O'Malley, Honorable Fred O. Dickinson, Honorable Floyd Christian and Honorable Doyle Conner, and their predecessors in office (Trustees); Col. Avery S. Fullerton, District Engineer of the Corps of Engineers, Department of the Army, Jacksonville, Florida (Corps).

2. The plaintiff claims that he has been denied without due process certain property rights with respect to dredging and fill operations of land in Palm Beach County, described in Plaintiff's Exhibit 1.

3. Jurisdiction of the court is based on the Fifth Amendment of the United States Constitution and 28 U. S. C. § 1332, 1361, Diversity of Citizenship. The amount involved is in excess of $10,000.

4. Bankers is now and has been since June 21, 1955, the riparian owner in fee simple of the upland real property located wholly within the municipal limits of the Village in Palm Beach County.

5. On April 17, 1965, plaintiff purchased from the Trustees, 2,500,000 cubic yards of fill material in the bed of Lake Worth. During the years 1957, 1958, and 1961, part of this fill material was used to fill plaintiff's land under the dredge permit which is subject matter of this action. Part was used to fill other lands. There remains approximately 1,117,800 cubic yards of this material in place and unused.

6. On April 29, 1957, the Corps granted a permit, SAKSP 800.61 (57-103), plaintiff's Trial Exhibit No. 22, to the plaintiff to dredge and fill and construct bulkheads at the property described in plaintiff's Trial Exhibit No. 4. At this time the plaintiff had complied with all applicable State and Local statutory and administrative regulations relative to the subject matter.

7. In December, 1960, the Corps extended the plaintiff's dredge and fill permit to December 31, 1963. It is noted that at this time, December 1960, the State laws, *Fla. Laws* 1957, Ch. 57-362, upon which the defendants rely were in full force and effect.

8. Prior to the expiration of the permit plaintiff applied to the Corps for an extension. On or about December 16, 1963, the Trustees wrote the Corps a letter, asking that the extension be withheld until the plaintiff had obtained a local (Village) permit in accordance with *Fla. Stat.* 253.124 (1957).

9. On or about December 27, 1963, the Corps wrote a letter, in which Mr. A. L. McKnight informed the plaintiff that the Corps would withhold the extension of the permit until a permit was obtained from the local authorities. Mr. McKnight states "we will be pleased to grant the extension promptly upon the withdrawal of the deferral request by the Trustees of the Internal Improvement Fund. The lapse in the permit will have no effect insofar as the Corps of Engineers is concerned." It is noted that Mr. McKnight is the signor of the letter of transmittal attached to the original permit.

10. The plaintiff in an effort to expidite matters attempted to obtain a permit from the Village which was granted on June 12, 1969. Then on July 10, 1969, the Village "revoked"[1] the permit. The Corps and Trustees refused to approve an extension of the permit because of the Village's action.

11. All of the actions of the several defendants were done by them under the color and pretense of the statutes,

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1. A question arose whether or not this was validly done—that is, both the granting and revocation of the permit. Since the court finds that the Village's action would have not effect on its decision, the court does not reach that issue.

ordinances, regulations and customs of the Village, State of Florida, County of Palm Beach and the laws of the United States of America, and all actions were done by them in their official capacities.

12. The court finds that the Florida Legislature intended to exempt Bankers from requirements of *Fla. Laws* 1957, Ch. 57-362 §4 at 811 by *Fla. Laws* 1957, Ch. 57-362 § 11 at 813.[2] Section 11 is an example of what is commonly known as a "grandfather clause."

13. At the time of the request for an extension of the permit, Bankers would have received the extension had it not been for the action of the Trustees in requesting the Corps to withhold approval. It is the opinion of the court that the Trustees acted contrary to state law. Bankers had previously obtained a permit and had commenced filling the land now in question prior to June 11, 1957, the effective date of the law that the Trustees now rely upon. But by that very law, *Fla. Law* 1957, *supra*, Bankers and others similarly situated were exempted from the provisions of that chapter. Florida courts have held that one who has obtained a permit from the Corps or made application for one was exempt by the provisions of Section 11. See *Bayshore* v. *Steckloff*, 107 So. 2d 171 (Fla. 1958). It is the opinion of this court that the Trustees should not have requested the Corps to withhold the extension of the permit as Bankers had complied with all state and local regulations which pertained to its receiving an extension of the permit.

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2. Laws of Florida, Chapter 57-362, Sec. 11.

Section 11. The provisions of this act shall not affect or apply to the construction of islands or the extension or addition to existing lands or islands bordering on or being in the navigable waters as defined in section 253.12 herein of the state which was commenced or application for permit to fill which was filed with the United States corps of engineers prior to the effective date of this act as to lands or bottoms lying between ordinary high water mark and a bulkhead line heretofore established by any country, city, or other political subdivision of the state by official action of its governing body.

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14. The Corps by its representative Mr. A. L. McKnight, Chief, Operations Division, Corps of Engineers, Jacksonville District, assured Bankers the Corps had no objection to an extension and one would be granted as long as Bankers was not in contravention of any state or local laws. As already stated the court finds that Bankers was not, and that the Corps should have granted the extension.

15. It appears that during the lapse of time the area involved has not been altered to the prejudice of any party so that the theory of laches, if in fact that be the theory of any of the defendants, is not applicable.

16. Two cases have been cited by the defendants as applying to this case. However, the court finds that the factual situations are so different as not to have any effect on the issue presently before the court. In *Duval Engineering and Contracting Co.* v. *Sales*, 77 So. 2d 431 (Fla. 1954) the parties were in dispute as to the ownership of submerged lands in front of the property of Sales. It had not been filled in by the owner. The Florida court stated in issue as follows:[3]

> "What was the effect of Chapter 26776, Acts of 1951, on the rights of riparian owners acquired under Chapter 8537, Acts of 1921, Butler Bill, F. S. A. § 271.01 *et. seq.*, said owners not having complied with the condition of the grant by filling in or permanently improving the submerged land continuously from high water mark in the direction of the channel."

The Florida court held that the owners had acquired no property rights under the Butler Bill and that the land was subject to sale pursuant to Chapter 26776, Acts of 1951.[4] It was noted by the court that the Acts of 1951 did not

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3. 77 So. 2d 431, 433 (Fla. 1954).
4. 77 So. 2d 431, 433 (Fla. 1954).

apply to Dade and Palm Beach Counties and also that the property here had not been filled in or permanently improved. In the present case the Butler Bill was still in effect in Palm Beach County until June 11, 1957, and the Legislature had expressly exempted those that had commenced filling or applied for a permit before that date. Thus Bankers was exempt.

In *Zabel* v. *Tabb*, 430 F. 2d 199 (5 Cir. 1970) the Corps had never approved a permit. This is not the case in the present controversy. The Corps, through its authorized representative, had already stated that it had no objections and that the permit would be extended except for the intervention of the Trustees. The Corp should not now be allowed to rescind its previous status. *Walsonavich* v. *United States*, 335 F. 2d 96 (3 Cir. 1964). In addition, the issues raised by *Fla. Laws* 1957, *supra*, were not present in *Zabel*.

17. In conclusion it appears to the court that although this controversy involves various parties representing the government, state and local authorities, actually it is a simple case of whether or not the owner of lands subject to overflow—as was practically all the Florida coastline at one time—and who was once given a permit to fill and deepen channels can now be denied that right because of certain new ecological controls without any proof or indications that what the owner plans to do is different from the first proposal and which plainly involves no injury to neighboring lands or channels except to uplift a fraction of the original lands to make them into islands and deepen certain already existing waterways and permit them to be made into channels for the moving of smaller boats and vessels. This court thinks not.

Let judgment be entered accordingly, each party to bear its own costs.

DONE and ORDERED at Miami, Florida, on this 22nd day of September, 1971.

/s/ Emett C. Choate
Senior United States District Judge.

cc: Ronald Sales, Esquire
Attorney for Plaintiff

Herbert Sikes, Esquire
Attorney for State of Florida

Herbert Gildan, Esquire
Attorney for Village of North Palm Beach

Robert Silverstein, Esquire
Attorney for United States Government

IN THE UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 71-3519

BANKERS LIFE AND CASUALTY COMPANY, etc.,
Plaintiff-Appellee,

vs.

THE VILLAGE OF NORTH PALM BEACH, FLORIDA, etc., et al,
Defendants-Appellants,

STATE OF FLORIDA BOARD OF TRUSTEES OF INTERNAL IMPROVEMENT TRUST FUND,
Defendant-Appellant,

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida

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(August 14, 1972)

Before TUTTLE, COLEMAN and CLARK,
Circuit Judges.

TUTTLE, *Circuit Judge:* These appellants complain of the order of the trial court ordering the Army Corps of Engineers to issue a permit for dredge and fill operations by the appellee, Bankers Life and Casualty Company on submerged land in Lake Worth, Florida. The land in question is wholly enclosed within the Village of North Palm Beach.

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Bankers also owned approximately 288 acres of land within the municipal limits of the Village, which land is riparian to Lake Worth, a navigable water of the United States which opens into the Atlantic Ocean. The order which Bankers sought, and which was a subject of the trial court's order, was to permit Bankers to dredge and fill an additional approximately 194 acres of the submerged land adjacent to its property by utilizing material from the bed of Lake Worth.

The history of this effort by Bankers to turn part of the waters of Lake Worth into land may be summarized as follows. On April 17, 1957, Bankers paid the Florida State Board of Trustees of the Internal Improvement Trust Fund of Florida (the state agency which at that time could appropriately deal with the matter) the sum of $26,000 for the use of 2,500,00 cubic yards of fill. Much of the fill, approximately 1,116,170 cubic yards, was consumed in the filling of other lands by Bankers and is not part of the subject matter of this action.

On February 15, 1957, Bankers applied to the Corps of Engineers for a permit to fill the property, and this was granted on or about April 29, 1957. There was nothing in the Federal Statutes at the time that required the Corps of Engineers to consider conservation, and there is nothing in the record to indicate that any study of possible ecological effects was made at that time. The permit which was issued carried the following statement on its face.

> "That this instrument does not give any property rights either in real estate or material, or any exclusive privileges."

It also stated that:

> "If the structure or work herein authorized is not completed on or before the 31st day of December, 1960, this permit if not previously revoked or specifically extended, shall cease and be null and void."

At the request of Bankers, the Corps, in December, 1960, extended the permit to December 31, 1963. The extension also contained the statement that if work authorized by the permit was not completed during the period of extension the permit would become null and void if not previously revoked or specifically extended. On December 16, 1963, the Trustees wrote the Corps a letter requesting that final consideration of Bankers application for another permit extension be deferred pending Bankers receipt of a local fill permit in accordance with Florida Statute Section 253.124. The Corps agreed to defer Bankers permit extension and on December 27, 1963, informed Bankers that it would not be possible to grant an immediate extension at that time because of Corps policy when there was local objection.[1]

For several years no further action was taken as between Bankers and the Corps of Engineers. During this time

1. This letter is reproduced as follows:

'With reference to your telephone conversation with Colonel Parfitt today concerning the pending extension of time of Department of the Army Permit No. 57-102 for the construction of bulk-head, dredging and filling in Lake Worth, information is furnished that no objections to the extension of time have been received from the standpoint of navigation and that it would be our plan to issue the requested time extension immediately upon termination of the notice period on 3 January, 1964 except for the receipt of a letter of the Trustees of the Internal Improvement Fund of the State of Florida under date of 16 December, 1963 requesting that final action be deferred pending granting of local fill permit in accordance with Section of 253.124, Florida Statutes of 1957.

"In view of the request of the Trustees of the Internal Improvement Fund it will not be possible to grant an immediate extension of time since Corps of Engineers policy is not to grant permits for work which is in contravention to state or local laws. However, we will be pleased to grant the extension promptly upon withdrawal of the deferral request by the Trustees of the Internal Improvement Fund. The lapse in the permit will have no effect insofar as the Corps of Engineers is concerned."

This document is signed by A. L. McKnight, Chief of Operations division.

various attempted settlements of disputes were negotiated between Bankers, the State of Florida and the Village of North Palm Beach concerning the title of the submerged lands sought to be filled. On December 6, 1968 and March 17, 1969, Bankers corresponded with the Village in an effort to obtain a local fill permit. In June, 1969, the Village informed Bankers that a permit would be granted; however, shortly thereafter on July 10, 1969, the Village undertook to rescind this action.

By letter dated July 10, 1969, the same date as the meeting of the Village Council rescinding the action of June, Bankers addressed a letter to the Corps of Engineers stating that a permit had been received by letter from the Village of North Palm Beach and stating that "in as much as there were no other objections to the extension of the permit, as stated in your letter of December 27, 1963, to us. I trust this removes the final obstacle and you will grant the extension requested promptly."

The Corps of Engineers, obviously not desiring to resolve any underlying disputes as to whether the requirements referred to in the original request to the Corps from the Trustees had all been met, responded by letter of July 18, stating "it will still be necessary, however, that the written approval of the Trustees of the Internal Improvement Fund be furnished before further action can be taken on your application."

The status of the matter thus was that the state agency had requested that the application be held up in December, 1963. The Corps of Engineers had held it up, indicating that once the matters referred to in the state's letter were cleared it would be the purpose of the Corps of Engineers to proceed with an issuance of the extension. However, it was not until more than five years later that Bankers undertook to inform the Corps that it considered the conditions previously existing to have now been satisfied. The

Corps of Engineers, quite appropriately, we think, deferred its action until it obtained a "go ahead" from the Trustees, the state body which had originally requested the deferment of the issuing of the permit.

Subsequently, Bankers instituted this suit requesting the district court to compel the district engineer, the Secretary of the Army and the United States to renew the permit or to issue a new permit.

The theory on which the plaintiffs' case was based was that the Corps of Engineers would have issued an extension of its permit but for the intervention of the trustees; that the trustees request to the Corps to withhold the extension "pending granting of local fill permit in accordance with Section 253.124, Florida Statutes, 1957," was a gratuitous interference by the Trustees in a matter in which, under existing Florida law, it had no power to act.[2]

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2. Simply stated, the argument goes that under the so-called Butler Act of 1921, riparian owners could, by the act of filling submerged lands adjacent to their uplands, actually acquire title to the new-made land. The statute of 1957 abolished this procedure and established title to submerged lands in the state, provided that thereafter such lands could only be disposed of by procedures that were not attempted to be complied with in this case. Bankers contends, however, that it was exempted from the 1957 law by a savings or "grandfather" clause, which reads as follows:

> "The provisions of this Act shall not affect or apply to the construction of islands or the extension or addition to existing lands or islands bordering on or being in the navigable waters as defined in Section 253.12 herein of the State which was commenced or application for permit to fill which was filed with the United States Corps of Engineers prior to the effective date of this Act . . . ."

Bankers contends that since it had the permit from the Corps of Engineers prior to June 11, 1957, the date of the Act, it was protected indefinitely thereafter in its right to proceed under the old law, so long as the Corps of Engineers continued to grant extensions. Bankers also claims to have *commenced filling* to June 11, 1957.

The trial court accepted this theory. It held that the 1957 Act prohibiting the acquisition of submerged lands by dredge and fill methods was not applicable to Bankers and that neither the Trustees nor the Village had any authority to interfere with its continued operation so long as the Corps of Engineers kept its permit in effect. The trial court issued its mandatory injunction directing that the Corps of Engineers grant the permit without reference to the position either of the Village or the Trustees, and without any consideration of the effect on either the ecology or the Village or state interests that, during the period of inactivity by Bankers, had come much to the fore both in state and federal legislation relating to submerged lands. Cf. *Zabel* v. *Tabb*, 5 Cir., 1970, 430 F. 2d 199. The court also decreed that Bankers be permitted to dredge and fill without permit from either Village or Trustees, and that, upon completion of such activity, title should be quieted in Bankers as to the lands thus created, all under the savings clause of the 1957 statute.

We have little difficulty in disposing of the government's appeal. The trial court clearly erred in enjoining the Secretary of the Army and the Corps of Engineers "to issue immediately to plaintiff, Bankers Life and Casualty Company, a good and sufficient extension of its permit to bulkhead and fill the submerged lands surrounding its real property, in accordance with all of the terms and conditions of the plaintiff's permit which expired on December 31, 1963, the term of the permit to be for three years from the date the permit is issued."

For the purpose of discussion of the government's appeal, we will assume that the Trustees incorrectly construed the 1957 statute as requiring Bankers to obtain a permit from the Village of North Palm Beach before dredge and fill operations could be undertaken within the village limits.[3] Never-

3. The correctness of the Trustees' position will be discussed later in this opinion.

theless, no authority of any kind is cited to justify the court's decision that if the Trustees' objection to the extension of the Corps' permit was improperly based, the Secretary of the Army could be required by what is, in effect, mandamus, to issue a permit in light of all the ebbing and flowing of the tides of change with respect to the duty of the Secretary of the Army in dealing with requests for such permits, by the time Bankers got around to making an affirmative demand upon the Corps of Engineers for a renewal of the permit.

Bankers, so far as this record discloses, was content to take no legal action to test the correctness of the Trustees' position or the Village's position for more than five years after being notified that the Corps of Engineers would not renew so long as objection was filed by the state agency involved. That five-year period, plus the time that elapsed before the entry of the final judgment in this case, is the point of time to which we must look. See *Zabel* v. *Tabb*, supra, where, speaking of the National Environmental Policy Act of 1969, 42 U. S. C. A. §§ 4331-4347, this court said:

> "This Act essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment.
>
> "Although this Congressional command was not in existence at the time the permit in question was denied, the correctness of that decision must be determined by the applicable standards of today."

Bankers is not in a position to complain, if, during the period of its own lack of effort to force the matter to an issue, the requirements on the Corps of Engineers for the issuance of a permit, although still couched in terms of "navigation," included by the time the law suit was filed, much more stringent requirements.

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The United States attacks the jurisdiction of the court to entertain the claim against it on the ground of sovereign immunity. Although we have some difficulty in finding any substantial difference between this case and *Malone* v. *Bowdoin*, 369 U. S. 643, and *Dugan* v. *Rank*, 372 U. S. 609, bearing on the lack of consent by the United States, we do not place our decision on this ground, since in *Zabel* v. *Tabb*, supra, this court dealt with the merits of a similar suit against the Corps of Engineers, and the United States turns its principal guns on the relief granted as against the federal officials.

From what we have already said by reference to the Zabel case, supra, it is clear that the Corps of Engineers does not grant or deny a permit as a purely ministerial act. Even though the letter to Bankers stating that but for the objection raised by the trustees, the extension would be granted, the letter makes it plain that the policy of the Corps of Engineers was not to grant such permit until such objection was withdrawn. This, of itself, made it plain that upon the finding of no obstruction in navigation, the Corps was using discretion based on other grounds than those normally strictly identified with navigation in determining under what circumstances it would issue a permit. In Zabel we have delineated further considerations that now must be given to such an application. The last two sentences of Mr. McKnight's letter read: "However, we will be pleased to grant the extension promptly upon withdrawal of the deferral request by the Trustees of the Internal Improvement Fund. The *lapse* in the permit will have no effect insofar as the Corps of Engineers is concerned." (emphasis added.) At best for appellee, these sentences are ambiguous since a lapsed permit cannot be extended. Certainly these sentences do not purport to make a commitment which would in any way bind the Corps of Engineers or the Secretary of the Army to disregard any

circumstance other than the lapse of the then existing permit in connection with the issuance of a new or "extended" permit.

Moreover, it seems clear beyond peradventure, that no statement made by Mr. McKnight could prevent the Corps of Engineers from complying with later requirements imposed by subsequent legislation on the issue of a permit regardless of the good faith of the official in writing the original letter. What did affect the Corps of Engineers was the deferral request by the Trustees. That request clearly was at least partially based upon ecological and environmental causes, which the Trustees considered they had the right to have dealt with before withdrawing their objection.

In the meantime, rather than filing a formal application with the Corps of Engineers, under which circumstances all of the inquiries which we have referred to at length in Zabel, would have to be made by the Corps before it could grant the permit, and without giving the Corps an opportunity to exercise its investigative and, at least partially, discretionary, powers, Bankers filed this action. The matter was not ripe for court action because the official of the government, who was empowered to act, had not been given an opportunity to perform the duties imposed on him by the federal statutes. As we said in Zabel:

> "When the House report [H. Rep. # 91-917, p. 5] and the National Environmental Policy Act of 1969 are considered together with the Fish and Wildlife Coordination Act [16 U. S. C. A. §§ 662(a)] and its interpretations, there is no doubt that the Secretary can refuse on conversation grounds to grant a permit under the Rivers and Harbors Act." 430 F. 2d 199 214.[4]

4. The government also contends that even though the extension had been granted in 1963, as requested by Bankers, it would have no more effect than the original permit and as to this, the United States contends that it would be revocable at

The trial court erred in enjoining the United States officials.

Disposing of the federal claim does not, however, end the need for appellate review here. This is true because the trial court also entered a decree which would quit title in Bankers to newly made lands, where formerly tidal waters flowed, contrary to what the Trustees and the Village authorities believed to be the applicable state law. We have held that, to resolve the Federal issue, we do not feel it necessary to decide whether Bankers was within the exemption of the 1957 statute putting an end to the acquisition of submerged lands in the manner in which Bankers here sought to accomplish it. This was so, because, as we have indicated, the Trustees were authorized to act as they did, even if they were in doubt, or even if there should have been doubt in their minds, as to whether the 1957 statute did exempt Bankers from its application.

Since this matter relates to a serious question of title to submerged lands under somewhat unique and unlitigated Florida statutes we are reluctant to construe more of these laws than necessary in order to assure the parties that the judgment of the trial court has been adequately disposed of. For the reasons hereafter stated, it becomes necessary for us to construe only a small part of the statutory language and place it to determine that the decree quieting title in Bankers must be set aside and that phase of the case remanded to the trial court for further proceedings.

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will, citing for that proposition the case of Miami Jockey Club v. Dern, 83 F. 2d 715, cert. denied 299 U. S. 556, and United States v. Chandler-Dunbar Co., 299 U. S. 53. The government thus says that even though the letter stating that it was the purpose of the Corps of Engineers to issue the permit under certain circumstances would be binding, this could not be any stronger than the permit itself, and, thus, no estoppel could arise even though an official, with authority to act, had expressly stated that such permit would be granted. We need not reach this point in order to decide that the case was not ripe for any injunctive or mandatory procedure against the federal defendants.

In order to pose the issue as simply as possible, we state the contentions of the parties. It is undisputed that prior to the Act of 1957, which went into effect on June 11 of that year, a riparian owner could extend his lands over submerged lands adjacent thereto out to what we will simply denominate as "the channel." This is variously described as "the bulkhead line" or "the channel" for navigation. By the Act of 1957, the state legislature undertook to abolish this means by which riparian owners could acquire title to accretions to their lands by filling in to the bulkhead line. The statute expressly reclaimed title in the Trustees of the Internal Improvement Trust Fund of the state of Florida for all such submerged lands. It made provision for the manner in which such lands could thereafter be disposed of, even to riparian owners.

The disagreement comes by virtue of the fact that Section 11 of the 1957 Act provides as follows:

> "The provisions of this Act shall not affect or apply to the construction of islands or *the extension or addition to existing lands* or islands bordering on or being in the navigable waters as defined in Section 253.12 herein of the State *which was commenced or application for permit to fill which was filed with the United States Corps of Engineers prior to the effective date of this Act*, as to the lands or bottoms." (Emphasis added.) Chap. 57.362, General Laws of Florida, 1957.

It is undisputed that on June 11, the effective date of the Act, Bankers had received a permit, issued in April, 1957, granting permission to dredge and fill the lands adjacent to those which were held by it as riparian owners. It is also conceded that Bankers purchased from Trustees 2,500,000 cubic yards of fill material to be dredged from the bed of Lake Worth, and that "in 1957, 1958 and 1961" Bankers filled a portion of its submerged lands under this permit. It is also agreed that this permit expired by its own terms at the end of three years, or on December 31,

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1960, and that it was renewed by the Corps of Engineers for an additional three years, thus expiring on December 31, 1963. Bankers' first argument is that the language application for permit to fill which was filed with the United States Corps of Engineers prior to the effective date of this Act," encompasses the situation in which it found itself in that it not only had filed such application, but it actually had received a permit. It says that this permit was then extended for an additional three-year period, and would automatically have been extended for an additional period, but for the "illegal" intervention by the Trustees when they asked the Corps of Engineers not to give consideration of such further extension until such time as Bankers complied with Section 253.124, Florida Statutes (described above).

Of course, it is Bankers' position that by virtue of the exemption in the 1957 Act there was no requirement that Bankers comply with such section. While for the purpose of this discussion we may agree that, as to the first three year permit, Bankers would fall strictly within the exemption language of the 1957 Statute, the Trustees make a strong case for the proposition that the Statute section must be construed strictly since such savings clause continued divestment of public lands in derogation of what has under the general provision of the law become a sovereign trust, citing *State ex rel Davis* v. *Love*, 126 Southern 374 (1930), 3 Sutherland, Statutory Construction, Sections 5501-06; 4937, 6503, 3rd Edition (1943). The Trustees take the position that the savings clause exempting from the operation of a new statute those who had a pending application for a permit before the Corps of Engineers be construed in any manner which would result in giving the exempted riparian owner any greater rights than were actually contained in the permit when issued; that the permit which, in this case, had already been issued, expired by its own terms in 1960; that any application thereafter for such

a permit or extension would not activate the exemption because such application would not have been one which had been "filed with the United States Corps of Engineers prior to the effective date of this Act." Thus, the Trustees say, would it stand with an application for extension made in December, 1963, the one on which Bankers here must base their case. Moreover, the Trustees in effect, state that the power of the court to require the issuance of a permit at the time of trial must be faced at the time when the new application was made to the Corps of Engineers, after Bankers claimed to have received a valid permit from the Village of North Palm Beach. This application was formally made on July 20, 1969. The Trustees undertake to bolster their position with respect to this view by citing an opinion of the Attorney General of the State of Florida to the following effect:

> "(1) The holder of an unexpired U. S. permit qualified to fill under Section 253.0013 (.....), FS., but who is not filled, is permitted to fill the submerged land as limited by the permit which he holds. If he desires to purchase rather than to exercise his right to fill, the provisions of the bulkhead law are applicable and there must be compliance with requirements for notice and advertising.
>
> "(2) Where a permit has expired or extended by the Corps of Engineers subsequent to June 11, 1957, we feel that the provisions of the Statute have not been met and that the exceptions from the provisions from the so-called bulkhead law are not applicable. The applicant must then purchase as required by law. . . .
>
> "(5) Since the exemption is to be strictly construed, any change in the permit as originally issued, whether by way of extension of time or area covered, is not in compliance with the exception of the Statute. The holder of the permit as modified or extended has no right to be accepted under Section 253.0013(2) FS." 1960 Attorney General Reports, 617-619.[5]

5. While Bankers say that the Attorney General is, in effect, a party to the litigation, and his opinion should have no more weight than the opinion of any other lawyer, at least we do note that this opinion was *ante litem motam*.

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The Trustees further bolster their contention by referring us to what they call "the long standing administrative interpretation set forth in Rule 18-2.11 (formerly Rule 200-2.11) Florida Administrative Code." This interpretative section provides "*Limitation defined for exemption* under Section 253.0013(2) FS. Exemptions set forth in Sections 253.0013(2) (FS) are operative only for (1) the unexpired period of the U. S. Army Corps of Engineers permit in effect June 11, 1957, or (2) the initial permit period for which the U. S. Army Corps of Engineers granted a permit pursuant to application pending June 11, 1957 and such exemptions will not be subject to extension."[6]

We have gone into some length in discussing whether the exemption in the 1957 Statutes applies to Bankers to indicate that, at the very least, the Trustees may properly have had the legal opinion that they should intervene with respect to the proposed extension of the Corps of Engineers permit in December, 1963. Bankers relies, as they say in the brief, "strongly" on the case of *Bayshore* v. *Steckloff*, 107 Southern 2d, 171 (Fla. app. 1958). We find that this case does not touch on the issue which is contended for by the Trustees here. It is clear that in Steckloff the District Court of Appeals in Florida held that a riparian owner who found himself strictly within the language of the exemption section of the statute, that is, one who had an application actually pending before the Corps of Engineers at the time of the effective date of the law, was entitled to dredge and fill under the old law during the period of the permit actually granted by the Corps as a result of the application which was pending on June 11,

6. While we are told by counsel for the Trustees that this Administrative Code was first adopted in 1962 upon passage on the Florida Administrative Procedure Act, Chapter 120, Florida Statutes, we are not given the benefit of any further indication as to the weight, if any, which should be given to such administrative rules or regulations under the Florida law.

1957. This does not reach the question whether a subsequent application for extension would bring such land owner within the provisions of the exempting section.

We do not attempt to solve this question of Florida statutory construction dealing with submerged lands. We should not do so, because of a strange quirk of the case that we note upon a careful reading of the record and comparing it with the findings of the trial court. In what it denominated "findings of fact and conclusions of law," the court said in paragraph 13: ". . . It is the opinion of the court that the Trustees [in requesting a deferment by the Corps of Engineers] acted contrary to State law. Bankers had previously obtained a permit *and had commenced filling the land now in question* prior to June 11th 1957, the effective *date of the law that the Trustees now rely upon.*" (Emphasis added.)

The pre-trial stipulation which appears to have been filed on December 20, 1970, contains a section titled "Concise Statement of Stipulated Facts Which Will Require No Proof of Trial, With Reservations, if any." Paragraph 11 contains the following statement: "All parties were *unable to agree* whether shortly after the permit was issued, plaintiff [Bankers began to fill the real property and submerged lands surrounding the real property and continued these filling operations until its dredge sank sometime later in the years 1957-58." (emphasis added.) Under a section entitled "Statement of Issues of Fact Which Remain to be Litigated at Trial" of the same stipulation, Paragraph 9 includes as one of the issues to be litigated at trial "whether Bankers began to fill the real property and the submerged land surrounding the real property and continued these operations until its dredge sank in 1957 or 1958." Then on March 17, 1971, and apparently during the course of the trial, at the court's suggestion, the parties filed a stipulation paragraph 2 of which contains the following statement:

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"Under the United States Corps of Engineers permit hereinafter mentioned, plaintiff has filled that portion of the property crosshatched in blue on the map and part of the isthmus between Munyon Island and the upland [this would be part of the lands with which we are here dealing.] Plaintiff does not have a deed to the area crosshatched in blue on the map. *The filling took place after June of 1957* and was completed prior to December 31, 1963." (emphasis added.)

Notwithstanding this explicit statement that the filling had taken place after June, 1957, the trial court was somehow persuaded to include in its findings of fact the statement quoted above from paragraph 13, "Bankers . . . had commenced filling the land now in question prior to June 11, 1957, the effective date of the law that the Trustees now rely upon." This same inconsistency appears in Bankers' brief filed in this court. Under a section in the brief entitled "Statement of the Facts," there is contained a sub-heading "Summary of the Facts Contained in the Stipulation for an Agreed Case and the Exhibits." In that section of the brief there is no statement to the effect that any of the filling had commenced prior to June 11, 1957. The statement is:

"On or about April 29, 1957, the Corps granted Bankers permit Number 800-61 (57-103) to fill the submerged lands surrounding the real properties out to the bulkhead lines. Bankers filled the real property and the submerged lands surrounding the real property under the permit *in the years 1957, 1958 and 1961.*"

Under a succeeding section, prior to the section entitled "Argument" there is what is stated to be a "Summary." One paragraph of this summary states as follows:

"On June 11, 1957, the Corps gave Bankers a permit to fill the submerged lands. *Prior to that date* Bankers filled in some of the submerged lands. Bankers is within the savings clause in FS § 253-135(2) 1969."

A careful reading of this record leaves us without any doubt that the date of June 11, 1957 was so critical with respect to the time of the commencement of the filling of the submerged lands[7] that it is incomprehensible to this court how much misstatement of the facts could occur.

However it may be, the finding of the trial court is clearly erroneous, for it is contrary to the stipulation entered into by the parties. Because of this fact, the judgment of the trial court to the effect that the exemption covered Bankers by reason of the commencement of filling prior to June 11, 1957 cannot be the basis for a judgment or decree interpreting the Florida Statute. We consider it appropriate that this entire issue be remanded to the trial court for further consideration in light of the facts as disclosed by the record. This will also enable the parties more fully to develop their respective positions touching on the weight to be accorded to the regulations which we have discussed above and consider any other developments in the Florida law with respect to titles to submerged lands. None of the parties has suggested that this court submit this question by certification to the Supreme Court of Florida as authorized under the Florida Statutes. Nevertheless, if the trial court should deem it appropriate the court may withhold a decision with respect to this matter of land titles in Florida pending an opportunity to be given to the parties to litigate this issue in the state courts.

The judgment of the trial court is VACATED and the case is REMANDED to the trial court with directions to dismiss the suit for injunction against the officials of the Army and the Corps of Engineers and for further proceedings with respect to the claim of the plaintiff for a quieting of its title as may be consistent with this opinion.

7. Arguably, if the filling had started prior to June 11, 1957, there would be a literal exemption within the statute, without regard to the duration of the Corps of Engineers' permit.

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 71-3519

BANKERS LIFE AND CASUALTY CO., Etc.,
Plaintiff-Appellee,

vs.

THE VILLAGE OF NORTH PALM BEACH, FLORIDA, Etc., et al.,
Defendants-Appellants,

STATE OF FLORIDA BOARD OF TRUSTEES OF INTERNAL IMPROVEMENT TRUST FUND,
Defendant-Appellant,

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida

(September 25, 1972)

ON PETITION FOR REHEARING

Before TUTTLE, COLEMAN and CLARK,
Circuit Judges.

PER CURIAM: Upon consideration of the petition for rehearing by Bankers Life and Casualty Company, the following changes are made in the opinion previously issued by the court:

Immediately following the sentence on page 3 of the court's original opinion, "At the request of Bankers,

the Corps, in December, 1960, extended the permit to December 31, 1963," the following footnote is added:

Footnote: "Prior to the granting of this extension, the 1958 Fish and Wildlife Coordination Act, 16 U. S. C. A. §§ 662(a) had become effective. Before this suit was filed seeking a mandatory injunction, the National Environment Policy Act of 1969, 42 U. S. C. A. §§ 4331-4347, had become effective. The effect of these statutes upon the functions of the Corps of Engineers is discussed infra."

The subsequent footnotes are renumbered accordingly.

The last full paragraph on page 9 of the court's opinion, beginning "The United States attacks the jurisdiction," is stricken and the following is substituted in lieu thereof:

> "It is clear that the district court had jurisdiction to entertain the claim against the officials of the Corps of Engineers as determined by the trial court. See Zabel v. Tabb, supra."

The opinion is modified accordingly.

The petition for rehearing is DENIED.

SUMMARY OF THE TESTIMONY OF ARTHUR L. McKNIGHT.

A summary of the testimony of government witness Arthur L. McKnight on direct and cross (contained at pages 188-200 of the appendix filed in the Court of Appeals) is as follows:

He is Chief of Operations Division of the Jacksonville District Office of the Corps of Engineers (as he was on December 27, 1963, when he signed the letter to Bankers). Bankers permit was about to expire. Bankers expressed concern that the expiration of the permit might have some adverse effect on the Corps continuing to process Bankers' application for the renewal permit. The reason he included the last sentence in the letter, "The lapse in the permit will have no effect insofar as the Corps of Engineers is concerned.", was to point out that if the permit lapsed, this would have no effect on the Corps' processing procedure and would have no effect on Bankers. No objections to the extension of the permit from the standpoint of navigation had been received by the Corps. At that time, the Corps dealt with ecological considerations as well. The Corps sent notices to the state and federal agencies involved for their comments about ecology. There would have been no adverse ecological sequelae if the permit had been extended on January 1, 1964. There must have been no overriding damages to fish and wildlife resources, or the Corps would not have extended the permit in 1960.

Appendix p. 193:

"Q. Had any objection to the extension of the permit been received from the standpoint of navigation?
A. From the standpoint of navigation?
Q. Yes, sir.
A. I believe no, sir.

Q. And that was the only consideration that the Corps had, was it not, in 1963, navigation?

A. No, sir.

Q. Were the birds and bees a consideration in 1963?

A. Yes, sir.

Q. In your experiences prior to the case known as Zabel versus Tabb, had the Corps considered the ecological considerations?

A. Oh, yes, sir, in many cases.

Q. Had the Corps also considered ecological considerations referable to the Bankers' permit?

A. They certainly would have been considered. They were not filed for consideration at the time we issued our notice in 1963.

Q. I take it that there was no adverse ecological sequela to this permit or it wouldn't have been issued in the first place.

A. Well, no sir. It was not issued.

Q. Was it issued and then extended for three years?

A. Yes, sir.

Q. We are talking about the same permit, aren't we?

A. Yes, sir.

Q. The permit I am talking about was issued in 1957 for three years and extended for three years—

The Court: I think we might get an answer—

The Witness: The Fish and Wildlife Coordination Act—

Mr. Silverstein: [Attorney for Government] He has got a wound up witness, Your Honor.

Mr. Sales: [Attorney for Bankers] I just want to hear his answer.

The Court: Go ahead, sir.

By Mr. Sales:

Q. Answer the question, sir.

A. The Fish and Wildlife Coordination Act which gave us this authority was passed in 1958, sir, and we did not have that on the books in 1957.

Q. But I take it, in 1960 when you renewed this permit?

A. Right.

Q. You, in your official capacity which you have held lo this many years, determined that there were no adverse ecological consequences of this permit?

A. Well, I can say this, that we must have determined that there were no overriding damages to the fish and wildlife resources, or we wouldn't have extended it in 1960."

It was the Corps' position in the matter on December 27, 1963, that the Corps would issue the extension of the permit immediately but for the request of the Trustees that the extension be deferred pending receipt of a local fill permit from the Village.

Appendix p. 198:

"Q. Wasn't it your position in this matter, on December 27, 1963, that the Corps would issue this extension immediately, but for a request from the Trustee of the Internal Improvement Fund that the extension be deferred pending receipt of the local fill permit?

A. Yes, sir."

Appendix p. 199:

"Q. So finally, Mr. McKnight—

A. I don't think I answered the last question.

By the Court: I think you did, sir. I think the Court heard the answer.

The question was, but for the Trustees requesting that you defer the extension of the permit in late 1963, you would have automatically extended it, and your answer was, yes.

A. I think we so stated in the letter. That is what it says here (indicating).

The Court: And he said the same thing just a moment ago."

253.124 APPLICATION FOR FILLING LAND.—

Any private person, firm or corporation desiring to construct islands or add to or extend existing lands or islands located in the unincorporated area of any county bordering on or in the navigable waters of the state as defined in § 253.12 by pumping sand, rock or earth from such waters or by any other means shall make application in writing to the board of county commissioners of the county wherein such construction is designed for a permit authorizing such person, firm or corporation to engage in such construction provided that where it is desired to construct islands or add to or extend existing lands in islands within the territory of any municipality such application for a construction or fill permit shall be made to the governing body of such municipality. In each instance the written application herein provided for shall be accompanied by a plan or drawing showing the proposed construction and shall also show the area from which any fill material is to be dredged if the proposed construction is intended to be created from dredged material. In the event such application be found by the board of county commissioners or other authorized body not to be violative of any statute, zoning law, ordinance, or other restriction which may be applicable thereto, or that no harmful obstruction to or alteration of the natural flow of the navigable water as defined in § 253.12 within such area will arise from the proposed construction, or that no harmful or increased erosion, shoaling of channels or stagnant areas of water will be created thereby, or that no material injury or monetary damage to adjoining land will accrue therefrom, the same shall be granted to the applicant, subject to the formal approval of the trustees of the internal improve-

ment fund. No construction permit shall be issued unless the proposed work is to be completed within two years next after the date of issuance of such permit. Such time may be extended for good cause, upon showing that all due efforts and diligence toward completion of said work have been made. The construction permit hereby provided for may be revoked for a non-compliance with or for a violation of its terms after notice of intention so to do has been furnished to the holder thereof by the board of county commissioners or other authorized body and an opportunity for a hearing afforded the holder. Any applicant for permit under this section shall have the right of appeal to the courts in the event such permit is refused and no permit shall be refused without a valid reason.